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In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 475.

RAY L. BERRY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF STATE OF OHIO OPPOSING PETITION FOR WRIT OF CERTIORARI.

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PRELIMINARY STATEMENT.

The Supreme Court of Ohio in this bribery case reversed a Court of Appeals decision and affirmed the judgment of the Common Pleas Court, whereby this petitioner, Ray L. Berry, had been convicted of bribery on four separate counts in connection with certain coal contracts between the Costanzo Coal Company and the City of Cleveland.

There is no claim that Section 12823 of the General Code of Ohio under which section the petitioner Berry was convicted, is unconstitutional. The validity of the Ohio statute is not drawn in question. The claim of petitioner is that in the construction and application of that statute it was misinterpreted and misapplied by the Trial Court and by the Supreme Court of Ohio. The opinion of the Supreme Court of Ohio in this case is set forth herein as Appendix "A."

FACTS.

On July 31, 1940 the petitioner, Ray L. Berry, together with Frank Costanzo, Robert L. Crow, and John L. Abbott was indicted for bribery under Section 12823 of the General Code of Ohio. Costanzo, Berry and Crow were interested in getting coal contracts with the City of Cleveland and supplying coal to the city. Abbott accepted bribes from these men to the amount of approximately three thousand dollars. In return Abbott helped them obtain contracts and then changed analyses of the coal.

The Bill of Exceptions shows that Abbott had been general foreman of the Youngstown Sheet and Tube Company (Bill of Exceptions, p. 140); that Abbott began working for the City of Cleveland as combustion engineer on July 11, 1922 (Bill of Exceptions, p. 42); that he then had charge of the boilers and furnaces at the Fairmount, Kirtland and Division pumping stations (Bill of Exceptions, p. 42); that it was his duty to make out reports of the efficiency of the boilers and to inspect the furnaces and the boilers for repairs (Bill of Exceptions, p. 43).

Lawrence J. Young, Secretary of the Civil Service Commission, testified to Abbott's status as follows:

> "Q. Now, can you tell this jury from your records when John L. Abbott was employed by the City if he was so employed?
>
> A. John L. Abbott was given a legal appointment of position of Supervising Engine Man May 11, 1925 and then given an appointment as Mechanical Engineer January 1, 1927, which position was reclassified by Ordinance 82101-B February 16, 1928 to Senior Assistant Mechanical Engineer.
>
> Q. And how long, if you know, did he serve as Senior Mechanical Engineer of the City of Cleveland?
>
> A. Since '27.
>
> Q. I beg your pardon?
>
> A. Since January 1, 1927.

Q. How long did he continue? His title was changed. How long after that did he continue in that position?

A. Up to the date of his dismissal.

Q. When was that?

A. April 25, 1938." (Bill of Exceptions, pp. 38, 39.)

The Bill of Exceptions further shows that in 1931 an ordinance was passed by which the City set up its own testing laboratory and Abbott was given charge of the chemists and the analysis of the coal (Bill of Exceptions, p. 44). The city chemists came under Abbott's supervision and Abbott helped break them in and the coal samplers came under the direction of Abbott (Bill of Exceptions, pp. 44, 45). Coal was purchased by the City on contract and occasionally by requisition. On larger contracts from 20,000 to 180,000 tons, Abbott generally went to the mine and took a 15-pound sample of each car diagonally across the cars. This sample would be crushed down to a composite sample and then analyzed by the city chemists (Bill of Exceptions, p. 47). In the cases where Abbott went to the mine and obtained a sample and then obtained a report from the chemists, Abbott would figure out the B.T.U. or heat value and make a report to his superiors (Bill of Exceptions, p. 57). The following testimony of Abbott appears:

"Q. So that the chemist's report which came through your hands would figure in the awarding of the contract?

A. That is right." (Bill of Exceptions, p. 58).

As the contractor would send coal into the different plants of the city from time to time, samples were taken by the coal samplers twice a month at some plants and four times a month at others and the samples were taken to the laboratory and analyzed by the city chemists. The chemists then made an analysis of the particular sample and forwarded on a mimeographed form to Abbott the results of the par-

ticular analysis showing the amount of sulphur, ash, moisture, B.T.U.'s etc. (Bill of Exceptions, pp. 59, 59A, 60). His office girl then made an original and four copies. One copy went to the Finance Department of the city and the chemist's report determined to some extent the amount of the voucher because of the penalties or bonuses. (Bill of Exceptions, pp. 60, 61.) Abbott made changes in the chemist's report before the five copies were made. He lowered the ash and lowered the sulphur and raised the B.T.U. (Bill of Exceptions, p. 91). In connection with the 120,000 ton contract the lowering of the ash and the sulphur prevented penalties and raising the B. T. U. affected boiler efficiency reports. (Bill of Exceptions, p. 91.)

In other words, Abbott was in a key position of controlling the analyses of the coal before contracts were awarded and was in the strategic position of changing chemists' reports and thus directly affecting the amount of money paid under the contract by fraudulent alterations of the chemists' reports which came to him (Abbott) from time to time. Abbott was in a position to help in the awarding of contracts and later was in position to cause more money than was proper to be paid on the particular contract by reason of alterations of the chemists' reports. And that is exactly what he did in return for bribes.

THE STATUTE.

Section 12823 of the General Code of Ohio reads as follows:

> "§ 12823. Penalty for Bribery.—Whoever corruptly gives, promises or offers to a member or officer of the general assembly, or of either house thereof, or to a state, judicial or other officer, public trustee, or an agent or employe of the state of such officer or trustee, either before or after his election, qualification, appointment or employment, any valuable thing, or corruptly offers or promises to do any act beneficial to such person to influence him with respect to

his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him, and whoever, being a member of the general assembly, or a state or other officer, public trustee, agent or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, solicits or accepts any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him, shall be imprisoned in the penitentiary not less than one year nor more than ten years (102 v. 129; R. S. § 6900.)"

THE INDICTMENT.

The first count of the indictment in this case reads as follows, in so far as is material:

"Do Find and Present, That Frank Costanzo, Ray L. Berry and Robert L. Crow during the period from on or about July 8th, 1935 to on or about the 14th day of July 1936, at the County aforesaid, violated the provisions of Section 12823 of the General Code of Ohio in the manner hereinbelow set forth:

"That during said period from on or about July 8th, 1935 to on or about July 14th, 1936, Frank Costanzo, Ray L. Berry and Robert L. Crow were engaged in the selling and supplying of coal to the City of Cleveland by and for the Costanzo Coal Mining Company; and that at all times during said period the said John L. Abbott was a duly appointed, qualified and acting senior assistant mechanical engineer of the City of Cleveland and in said position was an agent and employee of said City of Cleveland.

"That during the time aforesaid, at the County aforesaid, Frank Costanzo, Ray L. Berry and Robert L. Crow unlawfully and corruptly did give to the said John L. Abbott various sums of money at divers times and dates in the approximate sum of Twenty-Four Hundred ($2400.00) Dollars to influence the said John L. Abbott with respect to his official duties and to influence his action, opinion and judgment in a matter

pending, or that might legally come before him, and particularly to influence the said John L. Abbott with reference to the purchase of coal from the Costanzo Coal Mining Company, and with reference to the analysis, burning and use of said coal by the City of Cleveland, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

The third, fifth, and seventh counts of the indictment are similar in form. All defendants were convicted on each and every count.

POINT I.

THE INDICTMENT DID CHARGE AN OFFENSE.

In connection with the form of this indictment it is desired to call the Court's attention to the fact that this indictment follows the wording of the statute, to-wit: Section 12823 of the General Code of Ohio. In addition, the indictment goes beyond the wording of the statute and points out that the money was given "particularly with intent to influence the said John L. Abbott with reference to the purchase of coal from the Costanzo Coal Company by the said City of Cleveland, and with reference to the analysis of said coal, and burning and use of said coal contrary" etc. This indictment went further than was necessary in pointing out to the defendants the matters of which they were accused.

Section 13437-4 of the General Code of Ohio reads as follows:

> "Statement charging an offense.—In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statements may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the enactment describing

the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged. (113 v. 163, ch. 16, § 4. Eff. July 21, 1929.)"

Section 13437-5 of the General Code reads as follows:

"Form of indictment or information.—The indictment may be substantially in the following form:

"The State of Ohio, ... County, ss:

"Of the term of ..... in the Year of our Lord one thousand nine hundred and .....

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that A. B., on the ..... day of ....., 19.... at the County of ..... aforesaid, did .... (here insert the name of the offense if it has one, such as murder, arson or the like, or if a misdemeanor having no general name, insert a brief description of it as given by law) contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

..... C. D. .....

Prosecuting Attorney.

(Indorsed) A true bill.

E. F., Foreman of the Grand Jury.

(113 v. 163, ch. 16, § 5. Eff. July 21, 1929.)"

Even before the criminal procedure act of 1929 in Ohio went into effect no technical niceties were required in criminal pleading. In the case of *Burke v. State,* 104 Ohio State Reports 220 (1922), at page 223, it is said by Marshall, *C.J.*:

"The courts in recent times are to be commended for an effort to reach decisions based upon substantial principles rather than wornout forms. The niceties, refinements and technicalities of criminal practice had their origin in the early English prac-

tice at a time when the larceny of any value above twelve pence was punishable by death. It is not strange that the English judges would construe indictments strictly and rigidly enforce rules of practice to perfectly absurd limits in an effort to reach humanitarian results. Although the reason for such narrow and technical constructions has long since passed away, it is unfortunately true that too many courts, too closely wedded to precedent, fail to catch the modern spirit of adherence to the substantial and antipathy to the formal. Fortunately the number of such is comparatively small. The more recent tendency of legislatures is toward lightening the prescribed penalties, that of the courts toward leniency of sentence, and that of the executive branch toward liberality in exercise of pardoning power. There can therefore be no valid or sensible reason for applying absurd and senseless technicalities in the criminal practice and procedure."

In the case of *State v. Groves*, 80 Ohio State Reports 351 (1909), it is said by Crew, *C.J.*, at pages 360, 361:

"It is further objected by counsel for defendant that the indictment in this case is defective and insufficient, in the respect that it does not definitely state what particular felony the accused, at the time of the attempted breaking and entering, intended to commit. While it is a rule of criminal pleading, grounded upon sound principles, that the offense alleged to have been committed must be described with such precision and certainty as to advise the accused of the nature and character of the crime or offense charged against him, yet, as said by this court in *Stoughton and Hudson v. State*, 2 Ohio St., 563: 'Unreasonable strictness ought not to be required; and where an indictment clearly charges a crime, and fairly advises the defendant what act of his is the subject of complaint, the principal object of pleading is attained. The highest degree of certainty is not required; certainty to a common intent is sufficient, and no rule ought to prevail, which would only serve to shield the guilty, instead of protecting the innocent.' * * *"

In 1929 the Code of Criminal Procedure was enacted in Ohio. Chapter 16, Sections 13437-1 to 13437-34 deal with indictments and their form and sufficiency. The Court's attention is directed to Section 13437-2 which reads as follows:

> "§ 13437-2. Sufficiency of indictments or informations.—The indictment or information is sufficient if it can be understood therefrom:
>
> 1. That it is entitled in a court having authority to receive it, though the name of the court be not stated;
>
> 2. If an indictment, that it was found by a grand jury of the county in which the court was held, or if an information, that it was subscribed and presented to the court by the prosecuting attorney of the county in which the court was held;
>
> 3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury or prosecuting attorney, as the case may be, unknown, but no name shall be stated in addition to one necessary to identify the accused;
>
> 4. That an offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein;
>
> 5. That the offense was committed at some time prior to the time of finding of the indictment or filing of the information. (113 v. 162, ch. 16, § 2. Eff. July 21, 1929.)"

Again, Section 13437-6 of the Ohio General Code provides that:

> "The following forms may be used in the cases in which they are applicable, but any other forms authorized by this or any other law of this state may also be used, and other brief and comprehensive forms applicable to other offenses may be used." (Then follows short forms for seventeen different crimes, after which Section 13437-6 concludes with the following language):

"Provided, that the prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged." (113 v. 164, ch. 16, § 6. Eff. July 21, 1929.)

Section 13437-7 reads as follows:

"§ 13437-7. What defects in an indictment are not fatal.—An indictment or information shall not be invalid, and the trial, judgment or other proceeding stayed, arrested or affected by the omission of the words 'with force and arms,' or words of similar import, or the words 'as appears by the record'; or for omitting to state the time at which the offense was committed, in a case in which time is not of the essence of the offense; or for stating the time imperfectly; or the means by which the offense was committed except insofar as means is an element of the offense, or for want of a statement of the value or price of a matter or thing or the amount of damages or injury, where the value or price or the amount of damages or injury is not of the essence of the offense; and in such case it is sufficient to aver that the value or price of the property is less than, equals, or exceeds the certain value or price which determines the offense or grade thereof; or for the want of an allegation of the time or place of a material fact, when the time and place have been once stated therein; or that dates and numbers are represented by figures; or for an omission to allege that the grand jurors were impaneled, sworn or charged; or for surplusage or repugnant allegations when there is sufficient matter alleged to indicate the crime and person charged; or for want of averment of matter not necessary to be proved; or for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits. (113 v. 165, ch. 16, § 7. Eff. July 21, 1929.)"

It is to be observed from these sections that the legislature of Ohio intended to specify what a pleading and indictment *should* contain and also provide by statute what defects in an indictment are *not fatal.* For example,

Section 13437-4, in saying what each count *shall contain* states, among other things:

> "It may be in the words of the enactment describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged."

The last sentence in Section 13437-7, relating to what defects are not fatal, provides:

> "or for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits."

These sections came before the Supreme Court of Ohio in the case of *Breinig v. State*, 124 O. S. 39 (1931). In that case it is said by Jones, *J.*, at pages 42-44:

> "We agree that if the court should amend an indictment in such a manner as to change the name, character or identity of the offense, such an amendment permitted by the court could not cure the indictment, as such action would violate the provisions of the local and fundamental laws, cloaking the offender with the right to 'demand the nature and cause of the accusation against him.' Section 10, Article I of the Constitution. Any amendment in respect to that feature of the indictment would prejudice the substantial rights of the defendant. But Section 13437-29, General Code, pertaining to amendments, safeguards to the accused this right in providing that if the defect or omission be one in form or substance it may be amended 'provided no change is made in the name or identity of the crime charged.' In this case no claim can be made that the defendant was misled or prejudiced by the action of the trial court in permitting the county where the offense had been committed to be inserted in the indictment; nor can it be claimed that the defendant did not know from the proof adduced that the state was relying on the county of Scioto as the county in which the offense was committed. All the sections referred to were embodied in the new Code of Criminal Procedure and enacted by the Legislature at the same time. (113 Ohio Laws, 123

et seq.) Undoubtedly by their enactment the legislative purpose was to make criminal proceedings less antiquated, to eliminate technicalities, to reject our former more dilatory forms of procedure, and to adopt a more modern system providing a speedier trial for an accused without impinging upon his just and constitutional rights.

"This is evidenced in Section 13437-7. After providing that an indictment shall not be invalid for various omissions therein, that section further provides that 'an indictment * * * shall not be invalid * * * for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits.' "

The opinion of Judge Jones in the *Breinig* case just quoted indicates the purpose of this Ohio Code of Criminal Procedure. In that opinion it is pointed out that the principal purpose is to eliminate technicalities and adopt a more modern system without impinging upon the constitutional rights of the defendant. In the instant case, a public offense is stated. Under Section 13437-4, General Code of Ohio, an indictment is sufficient if the words of the enactment describing the offense are used *or* the matter is charged to be a public offense, *or* in any words sufficient to give the accused notice of the offense of which he is charged. In this case, Berry and the other defendants were given specific notice of the offense with which they were charged; they were given notice of the amount claimed to have been paid to Abbott together with dates and further, the purpose for which the money was paid and all other data necessary. Berry was not injured in his constitutional rights or any other rights by the form of this indictment. What difference would it make in the defense of this case, whether it was alleged that Abbott was an agent and employee of the City of Cleveland or an agent and employee of the Mayor of the City of Cleveland? The notice to Berry would be identical in either case as to the crime of which he was charged.

This attack upon the indictment was not made by a Bill of Particulars. In the case of *State v. Whitmore,* 126 Ohio State Reports 381 (1933) it is said in Syllabus 3:

> "All objections to an indictment, because of vagueness, indefiniteness, uncertainty and insufficiency, are waived by failure to seasonably request a bill of particulars."

In the *Whitmore* case it is said by Stephenson, *J.,* at page 386:

> "The new Criminal Code, Section 13437-29, General Code (113 Ohio Laws, 123, 169), authorizes the amendment of indictments by the prosecuting attorney; and it has been held by this court that the prosecuting attorney may go so far as to amend an indictment during the progress of the trial, provided the accused is not prejudiced thereby. *Breinig v. State,* 124 Ohio St., 39, 176 N. E., 674.
>
> "Section 13437-6, General Code, after making provision in a general way for the form of indictment or information, and providing forms for certain specific offenses, concludes with the following provision:
>
> > 'Provided, that the prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged.'
>
> "If the accused feels that he is prejudiced because of the vagueness, indefiniteness or uncertainty of the indictment, he has a right to apply to the prosecuting attorney or to the court to have these defects remedied. It may be done by amending the indictment or furnishing counsel for the accused with a bill of particulars, setting up specifically the nature of the offense charged.
>
> "This same procedure could be adopted in the event the indictment fails to state facts sufficient to constitute an offense under the laws of Ohio."

Again, it is said in the *Whitmore* case, at page 388:

> "The bill of particulars enactment was for the benefit of the accused, not the state. The accused has the

right to be reasonably informed as to the nature of the offense charged against him, so that he may be able to make an intelligent defense. But he must take advantage of the instrumentalities the law has placed in his hands, else he cannot be heard to complain.

"If the accused sees fit to forego his demand for a bill of particulars, should he afterward be heard to insist that the indictment is vague, indefinite, uncertain, or does not state facts sufficient to constitute an offense under the laws of the state? We think not.

"It must have been the legislative intent, when provision for a bill of particulars was made, that the use of the motion to quash, plea in abatement, and demurrer, would be minimized. What other purpose can a bill of particulars subserve?

"It is the holding of the court in each of these cases that the defendants, by failure to demand bills of particulars, waived their objections to the indictments because of vagueness, uncertainty, indefiniteness, or because they did not state facts sufficient to constitute an offense. Unless this order of criminal pleading was adhered to, the provision for a bill of particulars would be completely nullified."

Not only did the defendant fail to seasonably demand a Bill of Particulars but in fact none was requested. The record shows that no objection was made to the indictment until the day of the trial and then the question was attempted to be raised by a demurrer. If Syllabus 3 of the *Whitmore* case is applicable, then Berry waived any claim to the alleged insufficiency by failure to seasonably request a Bill of Particulars.

As to sufficiency of this indictment see also *Barker vs. The State of Ohio,* 69 Ohio State Reports 68.

POINT II.

THE EVIDENCE OF GUILT IS OVERWHELMING.

The defendants below, including the petitioner Berry, convicted themselves out of their own mouths. The books of the Costanzo Coal Company showed that more money was paid to Abbott than the state claimed. Crow met Abbott through Berry (Bill of Exceptions, p. 643); Berry admitted that Crow telephoned him that Abbott wanted two cents a ton (Bill of Exceptions, p. 535); Berry admitted that he discussed the matter with Costanzo (Bill of Exceptions, p. 536); Berry admitted that he had charge and supervision of the records and books of the company (Bill of Exceptions, p. 539); Berry admitted that after his talk with State Examiner Ryan in Ohio, he, Berry, went back and ordered erasures in the books. (Bill of Exceptions, p. 545.)

Berry, throughout his testimony as disclosed by the Bill of Exceptions, tried to shove the blame on the elderly gentleman Costanzo and on the young salesman Crow, who was not on a commission basis and would not profit by additional contracts. Berry tried to protect himself when the evidence shows that he was the General Manager and the directing force of the Costanzo Coal Company. Convicted under the same indictment Costanzo and Crow both served jail sentences.

The record shows that Abbott and Smith were taken on a boat trip on the Ohio River (Bill of Exceptions, pp. 485, 486); that defendants wined and dined Abbott (Bill of Exceptions, p. 473); that Berry took Abbott and Charlie Smith of the Cleveland Garbage Plant to lunch (Bill of Exceptions, pp. 534, 558); that $16.00 was paid for liquor for Abbott (Bill of Exceptions, pp. 464, 480); that they trimmed Abbott in a poker game and then loaned him his losses of $4.00. (Bill of Exceptions, pp. 464, 479, 561.)

Defendants, including Berry, voluntarily entertained Abbott lavishly; they bought him meals; they plied him

with liquor; they paid him approximately $3,000.00 over a period of years and then claimed extortion. If any of these defendants felt that it was extortion on Abbott's part, all they had to do was to go to Abbott's superior, or to the Mayor of the City of Cleveland, or to the Detective Bureau, or to the County Prosecutor and make complaint that they were being the victims of extortion on the part of Abbott. Not a complaint was ever made. The fact is that during these years of the depression, these three conspirators, and particularly Berry, the sales manager, had an insatiable craving for business and when it became necessary to buy the city business, they bought it.

The testimony of Abbott, excepting in minor details, is corroborated by the testimony of Costanzo, the testimony of Berry and the testimony of Crow. Abbott testified that on one occasion at a west side restaurant Berry handed fifty dollars to him. (Bill of Exceptions, pp. 64, 65.) This was in connection with the fourth count in the indictment. Berry denied it, but the jury found defendants guilty of it. It is to be noted that the payments to Abbott were made furtively and never in the presence of a third person.

The payments were recorded in the books of the Costanzo Coal Company but after the first two or three checks made to Abbott, their records did not show Abbott's name. The Costanzo books showed checks payable to Crow, who endorsed and cashed them and handed the cash over to Abbott. Why were the amounts on the books? It was urged by appellant in the Court of Appeals that this shows an innocent intent. The fact is that these three conspirators never expected an investigation; they never expected Abbott would talk; they never expected Crow would break down; they had their books in West Virginia beyond the jurisdiction of Ohio State Examiners; they felt brazenly secure in their location south of the Ohio border. The Court of Appeals did not and could not say that there was *no* evidence against Berry.

The Trial Court thought Berry deserved greater punishment than Costanzo and Crow. The Court's belief is reflected in the sentences.

In this case the record shows that not only was the money, month after month and year after year, admittedly given to Abbott, but the record shows that Abbott did the acts for which he was so regularly paid. The record shows that Abbott was paid to help the Costanzo Company get contracts; to change analyses, to avoid penalties and to secure bonuses for them. The evidence shows money paid corruptly and received corruptly beyond any doubt.

(a) Berry Was Guilty as a Principal, an Aider and Abettor and a Conspirator.

Section 12380 of the General Code of Ohio reads as follows:

> "§ 12380. *Aiders and abettors.*—Whoever aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender. (R. S. § 6804.)"

With careful forethought counsel for Berry contends that Berry gave no bribes, was neither a principal, an aider and abettor nor a conspirator. The Bill of Exceptions clearly establishes that he was all three. There is the direct positive testimony of Abbott that Berry handed him $50. As to this $50 payment, Abbott testified:

> "The Court: Let's find out who you mentioned. Mention them again.
>
> The Witness: Mr. Crow, Mr. Berry, Mr. Frank Costanzo and Mr. Smith.
>
> Q. You say you went out to lunch?
>
> A. Went out to lunch on West 25th Street.
>
> Q. I see. And what happened over there?
>
> A. Well, we had a table and ordered our lunch, and in the meantime, Mr. Costanzo, Mr. Smith and Mr. Crow went to the washroom. Mr. Berry handed

me $50. It was a $50 bill and he said—I said, 'I don't want to take that,' and he said, 'Well, now, for the help that you can give me when this contract comes out. Don't accept it as a bribe, but,' he said, 'more as a Christmas present.' So I took the $50.

Q. And when was this with reference to Christmas, if you recall?

A. That was between November 30th and December 24th in 1931." (Bill of Exceptions, pp. 64, 65.)

Counsel for Berry undertakes to undermine this testimony of Abbott about the $50. On pages 14 and 15 of Berry's brief, it is sought to refute Abbott's testimony as was done in the trial by the production of a little black memorandum book kept by Mr. Costanzo. This book showed an entry on February 8, 1932 of $50 and the entry read:

"Give to Crow for Abbott."

The defense further proceeded to show that Berry was not in Cleveland on February 8, 1932 and therefore could not have given Abbott the $50.

Now the fact is that Abbott testified that this $50 which was given to him by Berry over on West 25th Street at a restaurant was given to Abbott between November 30th and December 24th, 1931. It is to be observed that there was talk about a Christmas present. No one would talk about Christmas presents as late as February 8th. Likewise Berry's words "for the help that you can give me when this contract comes out" would be meaningless because the contract was signed before February 8th.

On cross examination the State undertook to get from Berry his expense accounts. On direct examination Berry had testified about his expense account for February, 1932. The following transpired on cross examination:

"Q. Now, Mr. Berry, you produced an expense sheet here for February, 1932. May I see your expense sheet two or three months prior to that?

A. There is all the expense sheets over there.

Q. And the month afterwards.

A. I do not have my expense sheets, as I understand, for November, December, or January and I could not find them. I didn't even attempt to look for them myself.

Q. You mean you don't have an expense sheet for November and December?

A. The man in the office tells me that.

Q. Was that one of the things that was ordered erased or destroyed?

A. No, sir, that was not." (Bill of Exceptions, pp. 582, 583.)

Later, the January, 1932 expense account was produced. (Bill of Exceptions, p. 585.) The following cross examination of Berry occurred with reference to the January expense account:

"Q. Now, here is a paper that purports to be January—what year is that?

Mr. Mahon: 1932.

A. 1932, paid on February 3rd.

Q. That is, the expense account was paid by the company to you?

A. That is right.

Mr. McGill: We will mark this State's Exhibit 8. Now—

Q. What is this entry here, Abbott and Smith, with a 12 in front of it?

A. Lunch.

Q. Then, you had lunch with him in January, didn't you?

A. And that looks like Abbott and Smith was at Wheeling.

Q. Well, now, what about this, Abbott and Smith, City of Cleveland?

A. Here?

Q. Yes. Here. Abbott and tip, expense $6, and garage, isn't that right?

A. It seems that I was in Cleveland on the 3rd, 4th, 5th, and—5th.

Q. Of what month and what year?

A. January, 1932.

Q. And what is that Abbott and Smith entry about?

A. I imagine it was for lunch. I have got the tip in there also so that looks like it was—like what it was, and garage." (Bill of Exceptions, pp. 586, 587.)

Here is an admission out of Berry's own mouth and corroborated by his January, 1932 expense account that Berry had taken Abbott and Smith to lunch at an expense of $6 and even had the tip included in his expense account. This record showed that Berry was in Cleveland on the 3d, 4th and 5th of January, 1932 and was *then* entertaining Abbott.

Charlie Smith had charge of the Garbage Disposal Plant and the contract under consideration provided for coal to the Garbage Disposal Plant. Berry took Abbott, Bob Crow and Smith to lunch again on February 5, 1932 (Bill of Exceptions, p. 534), on this day the contract was signed. (Bill of Exceptions, p. 531.) Berry's $50 payment to Abbott would naturally come before the contract was signed. Abbott's testimony rings true. The November and December, 1931 expense sheets of Berry were never produced although demanded. How, under this state of facts, could the entry in Costanzo's little black book on February 8th disprove Abbott's testimony that Berry actually handed him $50 between November 30th and December 24th, 1931? It is significant that defendants produced one hundred and thirteen exhibits, including checks, invoices, ledger sheets, expense books and certain expense sheets—in fact everything *excepting Berry's November and December 1931 expense accounts.*

It is the claim of counsel for Berry that Berry gave no bribes and was not connected with this conspiracy. The fact is that the Bill of Exceptions is replete with testimony showing a conspiracy and that Berry participated as an aider and abettor and was one of the conspirators. It

must be borne in mind that Berry was the Vice President and Sales Manager of the Costanzo Coal Company (Bill of Exceptions, p. 25), and that Berry as Sales Manager was most interested in obtaining the contracts. There was no denial by Berry of the testimony that he entertained Abbott at luncheons. In fact, both his January and February, 1932 expense accounts showed where he paid for the luncheons. On direct examination Berry testified:

> "Q. Was there such an occasion in which—did you ever have any luncheon over there among whom were present Mr. Abbott and Mr. Costanzo?
>
> A. I can't recall any particular luncheon. There may have been a luncheon there. I recall several luncheons at the Hotel, out on the west side, over here on the east side." (Bill of Exceptions, p. 530.)

May we pause at this point to inquire why Abbott instead of Abbott's superiors was taken to luncheons repeatedly by Berry? Normally this hard headed Vice President and Sales Manager would not be wasting his time and money on little Abbott unless he wanted Abbott to do something. What could Abbott do? What did Abbott do? Why was approximately $3000.00 paid to Abbott by these defendants? The answers are found in Abbott's testimony and in the Bill of Exceptions and exhibits in this case.

Abbott testified in part as follows:

> "Q. And what talk did you have about the larger contract, 120,000 tons?
>
> The Court: Now, relate what was said by him and what was said by you as nearly as you can recall.
>
> The Witness: When these bids were opened for the 120,000 tons, or advertised for the 120,000 tons, Mr. Crow and I had several talks. Mr. Crow said, 'Now, we want this piece of business, and we will give you two cents a ton if we can get it, and for your help in helping us get it,' and I said, 'Well, that will be all right with me.' I had a talk with Mr. Berry, and Mr. Berry said that he would see that I got the two cents a ton. 'What did Bob offer you, Jack,' he said.

I said, 'Two cents a ton.' He said, 'That is all right, I will see that that is carried out if we get the 120,000 tons.'

Q. Did they get that contract?
A. They did.
Q. Did you get your two cents a ton?
A. I did." (Bill of Exceptions, pp. 78, 79.)

Again Abbott testified:

"Q. And you said you talked with Berry about one or more of those contracts?

A. On this 120,000 tons, I had a talk with Mr. Costanzo, Mr. Berry and Mr. Crow.

Q. Where was that?

A. In the Hollenden Hotel." (Bill of Exceptions, p. 82.)

On this matter of changing the analyses Abbott testified:

"Q. Now, in connection with that 120,000 ton contract, what, if anything, did you do with respect to analyses of coal from time to time?

A. Well, I changed the ash, I think, and the sulphur. I lowered the ash and lowered the sulphur and raised the B.T.U.

Q. And in this particular contract, what effect did that have on penalties?

A. In this particular contract, to lower the ash would prevent them from having a penalty and in lowering the sulphur would prevent them from having a penalty. In raising the B.T.U., would affect my boiler efficiency reports.

Q. Were there penalties in that contract for low B.T.U.?

A. No, sir—yes, there was. It would prevent them from having a penalty, wouldn't give them a bonus.

Q. By keeping the B.T.U. up to standard or above there would be no penalties, is that correct?

A. That is right." (Bill of Exceptions, pp. 90, 91.)

At page 15 of petitioner's brief it is said:

> "There is no evidence in the record that Berry knew anything about any changes in the chemical analyses," etc.

As to Berry's *knowledge* of Abbott's *position* and *ability* to change analyses and Berry's *desire* that Abbott should change the analyses, the following appears in the testimony of Abbott:

> "Q. Well, go ahead, just tell us what you did or what conversation you had with them.
>
> A. I had a conversation with Mr. Crow and Mr. Berry.
>
> Q. Let's take that up first. What was said about it?
>
> The Court: Where was this?
>
> Q. Yes, where was this?
>
> A. That was in Mr. Berry's own room in the Hollenden Hotel. Mr. Crow wanted the analyses to run just as high as it could run so that it would give them an advantage over the number of B.T.U. for one dollar that the City spent for heat units so that it would compete with deep mined coal, so that their stripping mine would compete with deep mined coal. The Guffey Act was in effect and they didn't want their mine classified as being as good as deep mined coal. They had had several analyses run by Gulich and Henderson in Pittsburgh and they found out that their coal would run pretty nearly as good in B.T.U. on certain samples of coal as the deep mined coal runs. Berry said, 'No, we don't want you to get the B.T.U. too high. And if you get it too high, the Government will put our coal in the classification that we don't want. We want to be put in the same classsification that the stripping mines of Ohio is put in, and, therefore,' he said, 'don't allow it to run too high,' so I had to reduce the number of B.T.U. that the analyses actually showed." (Bill of Exceptions, pp. 100, 101.)

This testimony clearly shows that Crow, Berry and Abbott were discussing not only changes to be made by

Abbott in the analyses but also *how* and to *what extent* the changes should be made. Abbott would have no motive in framing or fabricating such a statement as is just quoted. It would be next to impossible for a witness to tell such an unusual incident unless it actually occurred.

Berry knew about classification of coal and the Guffey Act because Berry was Chairman of the Coal Producers Board for District No. 108 under the Bituminous Coal Act of 1927 and the later Guffey Act. (Bill of Exceptions, p. 547.)

Berry on direct examination testified:

> "Q. And your mines are in that Panhandle District?
>
> A. That is correct. I am also a member of the Price and Classification Committee for that district and have been a member of that committee since 1933, during the coal code and the other two Guffey Acts." (Bill of Exceptions, p. 548.)

Again Abbott testified:

> "Q. Now, you started to tell us what Mr. Berry said and I don't recall that you finished.
>
> A. Why, Mr. Berry said that if we get the B.T.U. analysis too high, the Government will place our—place this Brady Mine at a higher price which I think they evidently did.
>
> Mr. Fulton: Now, if your Honor please, I move that go out.
>
> Mr. McGill: That may go out, that last is not responsive." (Bill of Exceptions, p. 102.)

Nowhere in the testimony of Berry is there any specific denial of Abbott's testimony that Berry asked him to lower the B.T.U. so as to keep the coal in a desired classification, although Berry did testify that he knew nothing about changes in analyses. (Bill of Exceptions, p. 551.) Nowhere, does Berry deny numerous luncheons with Abbott. Nowhere does Berry deny the fact that he was in Cleveland trying to obtain contracts and was in close touch with

Abbott, Charlie Smith and Attorney Krueger, who was a former Utilities Director and who was paid 5 cents a ton by the Costanzo Coal Company for legal services. On cross examination of Berry the following transpired:

"Q. Were you at that meeting at the Hollenden that has been talked about so much?

A. I was at a meeting at the Hollenden Hotel, yes.

Q. About the day that the contract was signed?

A. Well, I can't recall now.

Q. Well, let's go over it once more. Do you recall a meeting at which you and Mr. Crow and Mr. Costanzo and Mr. Abbott and Mr. McKinsey and Mr. Krueger were present in a couple of rooms up in the Hollenden?

A. I remember of being there and having lunch, but I don't believe that Mr. Costanzo was there.

Q. I see. Was Krueger and Abbott there?

A. I remember a day when Mr. Krueger was there.

Q. And was Abbott there?

A. I think that maybe Mr. Abbott was there that day." (Bill of Exceptions, pp. 573, 574.)

Speaking of the employment of Attorney Krueger, Berry testified on cross examination:

"Q. When did you make that agreement?

A. When he first started to work for us.

Q. Of paying him 5 cents a ton?

A. Yes, on the first coal business that we got. However, we were not going to be fully obstinate about it. If we never were successful in placing a bid that was right, that we would pay him something and I believe it was something like $600 paid Mr. Krueger before this happened.

Q. Of course, you wanted him to help get the business too, didn't you?

A. I would say we wanted him to do everything he could to help us get business." (Bill of Exceptions, p. 578.)

Again speaking of the employment of Attorney Krueger on a 5 cents per ton basis for legal services, Berry testified on cross examination:

> "A. * * *. We thought that if we based his compensation on some basis, as a tonnage basis, that he would work harder to go to a friend and say, 'Now these people are all right,' and give us a good name up here.
>
> Q. He would work harder on a tonnage basis?
>
> A. Yes, sir.
>
> Q. He had done this work the year before you just said?
>
> A. Well, that is true but it was also in consideration—
>
> Q. Of him having worked harder?
>
> A. Yes, sir." (Bill of Exceptions, p. 577.)

Here is Berry claiming that he had nothing to do with obtaining the 120,000 ton contract except figure the price (Bill of Exceptions, p. 573), and yet admitting on cross examination that he employed an attorney at five cents per ton and this to be the basis for legal services. And the record shows that Attorney Krueger was actually paid on that basis. Why was Attorney Krueger to be paid five cents per ton? The obvious answer is, so that he would exert his utmost efforts in helping them get the contract.

Again Berry's connection with the 120,000 ton contract is shown in the fact that without any written authorization from the Director of Utilities which the contract required, Berry arranged with Mathiott of the Valley Camp Coal Company to obtain 50,000 tons from another mine owned by the Valley Camp Coal Company. The Costanzo contract specified that the coal would be shipped from the Richland Mine. The following testimony of Berry on cross examination is illuminating:

> "Q. Now, Mr. Berry, you don't mean that this arrangement with Mathiott to get 50,000 of coal from them was made before this contract was entered into, this contract 19184, State's Exhibit 4?

A. It was made after the bids were put in with the City of Cleveland at about the time that the contract was made.

Q. I thought you said in answer to Mr. Fulton that it was before the contract was made.

A. It was between the bids were in at the City of Cleveland and before the contract was made.

* * * * *

Q. Your agreement, your contract called for 120,000 tons from the Richland Mine, didn't it?

A. That is right, looking back at it now, I find that that is true.

Q. And you, as vice-president and sales manager, in violation of that contract, got 50,000 tons elsewhere, didn't you?

Mr. Fulton: I object to the form of question.
Mr. McGill: Why?
The Court: Overruled.
Mr. Fulton: It is argumentative.
The Court: Overruled.

A. We did not get 50,000 tons. The figures show less than 40,000 tons." (Bill of Exceptions, pp. 569, 570, 571.)

State's Exhibit No. 4, the contract for 120,000 tons specified a particular mine. Berry arranged with Mathiott of the Valley Camp to buy 50,000 tons from a mine not specified to be shipped on this particular contract. Every contract provided that there could be no substitution of coal from other than the mines specified without written authorization of the Director. It will be seen that Berry testified that he, himself, arranged for the 50,000 tons, and that he told Crow to get the authorization. Later Berry testified as follows on cross examination:

"Q. Did you ever read your contract?

A. Yes.

Q. Did you know there was a provision in there that you have to get written authorization to substitute? You know that?

A. I didn't know it.

Q. How many years have you been in the coal business?

A. I have been in the coal business around the coal mines and office and all since 1912.

Q. What do you pay lawyers for?

Mr. Fulton: I object to that.

A. Everything.

The Court: Sustained.

Q. Just why did you ask Mr. Crow to get that written authorization if you didn't know about it?

A. I don't believe that I told him to get the written authorization since thinking about it. I told him to tell Mr. Quayle about it." (Bill of Exceptions, p. 572.)

If it were not for the bold assertion of Berry's counsel that there is no evidence involving Berry much less of the testimony would have been quoted heretofore. No one can read half of this Bill of Exceptions without being convinced that Berry, as Vice President and Sales Manager, was the directing force in the company, and that he not only knew all about this arrangement with Abbott but that he acquiesced in it and encouraged it and participated in it, even to a discussion as to what particular changes of analyses Abbott should make. His employment of Attorney Krueger on a basis of 5 cents per ton shows an insatiable craving for the business on his part. Berry had complete charge of the books and everyone in that office worked under him as he testified. When the matter broke and after he was interviewed at East Liverpool, Ohio, he rushed back to the company's offices in West Virginia and ordered erasures in the books. No one can read this Bill of Exceptions and say that there is not abundant evidence of Berry's guilt, both direct and circumstantial. Berry's position, his ownership of 300 shares of stock, his participation in the conferences in Cleveland both in connection with the 120,000

ton contracts and the garbage disposal contracts, his expenditures on behalf of luncheons for Abbott and Charlie Smith, his employment of Attorney Krueger, his discussions with Crow, Abbott, Costanzo and others in Cleveland, all establish overwhelmingly that he was as intimately connected with this conspiracy if not more so than was Mr. Costanzo. The trial Court's view of Berry's degree of guilt is reflected in the sentences.

POINT III.

THERE ARE NO DEBATABLE CONSTITUTIONAL QUESTIONS INVOLVED.

Petitioner claims that the indictment did not state an offense and that the proceeding under the indictment was a nullity and that, therefore, there was a denial of due process of law.

An appeal from a Court of Appeals may be taken to the Supreme Court of Ohio (1) as a matter of right where there is a constitutional question involved, or (2) on motion for leave to appeal. In this case the appeal was taken by the State on motion for leave to appeal. Briefs were filed and oral arguments were made upon the motion. The Supreme Court granted the motion and subsequently printed briefs were filed and the case was later argued on the merits. Thereafter, the Supreme Court of Ohio rendered the opinion, a copy of which is attached hereto. This brief history is set forth for the reason that in the first brief filed by Berry, Appellee, in the Supreme Court of Ohio, no mention was made of constitutional questions. In the second brief filed on the merits, where Berry as defendant-appellee moved to affirm the judgment of the Court of Appeals, the following appears in that brief in the Supreme Court of Ohio:

> "There can be no doubt that the judgment of the Court of Appeals is based upon the insufficiency of the evidence.

"Rule XIX of this Court provides:

'Rule XIX. Motion to Affirm. In all cases in which the judgment of the Court of Appeals reversing the judgment of the Court of Common Pleas, is wholly or partly on the ground that such judgment is not sustained by sufficient evidence, and an appeal is filed in this Court upon the record of the Court of Appeals, a motion to affirm such judgment forthwith shall be entertained.'

If this rule of procedure is not applied and if this motion to affirm is denied, defendant-appellee will have been denied due process of law as guaranteed by the constitutions of the United States and of the State of Ohio, as a result of having his cause heard and considered upon an indictment which, in law and under the statutes of Ohio, is a nullity." (Defendant-appellee's brief on merits in Supreme Court of Ohio, pages 3 and 4.)

The above quotation was the only mention of due process or other constitutional questions until *after* the decision of the Ohio Supreme Court. It was not mandatory for the Supreme Court of Ohio to follow Rule XIX of that court. All the rule provides is that the Supreme Court of Ohio shall *entertain* such a motion where there has been a reversal by a Court of Appeals on the ground of insufficient evidence. Clearly the Court could waive its own rule if necessary.

The jurisdiction of the Supreme Court of Ohio is set forth in Article IV Paragraph 2 of the Constitution of the State of Ohio, which article provides in part as follows, to-wit:

"* * * In cases of public or great general interest the Supreme Court may, within such limitation of time as may be prescribed by law, direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the Court of Appeals, etc."

It would be a novel situation if a rule of the Supreme Court of Ohio which provides that such Court shall *entertain* a motion would take away from such Supreme Court the power vested in it by the constitution of the state to review, affirm, modify or reverse the Court of Appeals.

In the Court of Appeals there was no claim that the appellant Berry had been deprived of any of his constitutional rights. For that reason, the opinion of the Court of Appeals set forth at page 18 of petitioner's brief makes no reference to any constitutional provisions. Appellant waived his right to later assert a violation of constitutional rights. See *Scott et al. vs. City of Columbus,* 109 Ohio State Reports 193; also same case 265 U. S. 579 and 269 U. S. 528.

The defendant-appellee Berry did not specifically call the attention of the Supreme Court of Ohio to any particular provisions of the constitution until after the decision and opinion of the Ohio Supreme Court. For that reason the Supreme Court made no mention of them in its opinion. Then, in an application for a rehearing and a motion for modification of the judgment the following appeared:

> "(2) This Court's judgment does and will deprive this appellee of his liberty without due process of law in violation of (a) Amendment XIV of the Constitution of the United States; and (b) Article I, Sections 1, 6, 10 and 14 of the Constitution of the State of Ohio.
>
> "(3) This Court's judgment does, and if carried into effect, will necessarily place this appellee in double jeopardy in violation of Section 10 of Article I of the Constitution of the State of Ohio."

These matters are set forth herein for the reason that counsel for Berry did not consider constitutional questions of any importance until the Supreme Court of Ohio had reversed the Court of Appeals and affirmed the judgment of the Common Pleas Court and had written its opinion. No mention of any alleged double jeopardy was made until the application for a rehearing.

An examination of the opinion of the Supreme Court of Ohio, which is attached hereto for convenience as Appendix "A" will demonstrate to this Court that there was involved only the construction of a state statute, to-wit: Section 12823 of the General Code of Ohio in the light of Sections 13437-2, *et seq.*, of the General Code of Ohio. The Supreme Court of Ohio did not make new law as is contended on page 16 of petitioner's brief, but it did interpret and apply the bribery statute of Ohio to the facts in this case.

Accordingly, there is no justification for the claim that the petitioner was denied due process of law. No claim is made that the Ohio statute is in conflict with any provision of the United States Constitution or the laws of the United States. There is involved only the interpretation of an Ohio Criminal Statute by the Supreme Court of Ohio.

The claim that Berry was discharged by the Court of Appeals and that the Supreme Court's decision may require a resentence certainly does not call for the application of the constitutional provision regarding double jeopardy.

It is said in Volume 12, *Ohio Jurisprudence,* page 198, paragraph 161:

> "In order that an accused may avail himself of the constitutional guaranty that 'no person shall be twice put in jeopardy for the same offense,' it is necessary that he should have been put on trial on an indictment or information good and sufficient as to form and substance, which would have warranted a conviction, if the criminal act had been proved. It may be stated as the general rule that where an indictment is quashed at the instance of the defendant, though after jeopardy has attached, he cannot thereafter plead former jeopardy when placed on trial on another indictment for the same offense."

This indictment was good both as to form and substance. The Supreme Court of Ohio has settled the argument beyond any question. It is the claim of counsel for Berry that the *form* was not correct under the wording of the Ohio bribery statute. The defendant Berry did not object to the form seasonably by requesting a bill of particulars as is required under Section 13437-6 of the General Code of Ohio and the *Whittemore* case in 126 Ohio State Reports, p. 381. Furthermore, there was no motion to quash. The statutes regulating the amendment of criminal indictments and pleadings in connection therewith gave full power and authority to amend this indictment before, during, or after trial if it had been deemed necessary or advisable. Berry was only placed on trial once. He was only sentenced once and when the Supreme Court of Ohio affirmed the judgment of the Common Pleas Court no additional jeopardy arose or could arise.

Section 13449-4 of the General Code reads as follows:

> "§ 13449-4. Effect of granting motion for new trial.—
>
> When a new trial is granted by the trial court, or when a new trial is awarded on proceedings in error, the accused shall stand for trial upon the indictment or information as though there had been no previous trial thereof. (113 v. 196, ch. 28, § 4. Eff. July 21, 1929.)"

It is said in 12 *Ohio Juris.*, page 216, paragraph 185:

> "§ 185. After Reversal of Judgment on Error.—After reversal of a judgment upon a verdict of guilty on account of error in the proceedings, the prisoner is not protected from a second trial before a jury by the provision of the Bill of Rights that 'the accused shall not be twice put in jeopardy for the same offense.' The statute which first authorized the reversal of judgments in criminal cases did not regard the second trial which might result as a viola-

> tion of the Bill of Rights, nor have the courts so regarded it. They have always acted upon a different principle, and have uniformly directed a second trial whenever the case seemed to require it. Setting aside a verdict and reversing the judgment at the instance of the defendant, places the state and the defendant in the same position they occupied before trial, and the defendant cannot be heard to say that a verdict of guilty on the third count of the indictment must stand as an acquittal of the offense as charged in the first and second counts of the indictment."

No second trial is involved in the instant case.

The petitioner claims a violation of Article XIV of the Amendments to the Constitution of the United States, in that Berry was deprived of life, liberty and property without due process of law. There was no lack of due process because all of the constitutional guarantees surrounded this petitioner in his trial by a jury. Likewise, his case was reviewed by an appellate court and finally by the Supreme Court of Ohio. Certainly, he was accorded notice and hearing, the right to cross examine witnesses and all of the other fundamental rights involved in "due process of law." To urge that there was a lack of due process because the Supreme Court of Ohio exercised power vested in it by the Constitution of Ohio is wholly untenable.

There is no violation of Article V of Amendments relating to double jeopardy under the facts in this case. Berry was properly indicted and regularly tried. The Court of Appeals reversed the judgment and undertook to discharge the appellant Berry. The Supreme Court of Ohio with power to review, affirm, modify or reverse, did reverse the Court of Appeals and affirm the judgment of the Common Pleas Court. The alleged double jeopardy resulted from two hearings in the Supreme Court. There was no final discharge of appellant Berry by the Court of Appeals. It was subject to the action of the Supreme Court

of Ohio, and when this latter court affirmed the judgment of the Common Pleas Court, Berry was in exactly the same position that he was in after trial and after sentence. It would be a futile thing to require the Common Pleas Court to again sentence Berry. There is no such requirement.

As indicated from the foregoing, it is the contention of the State of Ohio in this brief that the construction of state statutes belongs to the state courts. See *Hebert, et al. vs. State of Louisiana*, 272 U. S. 312; 48 A. L. R. There is no claim that the Ohio statute conflicts with the Constitution or laws of the United States.

The matter presented to this Court in the petition for writ of certiorari and in the brief in support of that petition, are matters arising under the laws of the State of Ohio and involving only an interpretation of an Ohio statute without any substantial constitutional questions involved.

For these reasons it is urged that the petition for writ of certiorari be denied.

Respectfully submitted,

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